Supreme Court, U.S.
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In The

Supreme Court of the United States

PROFESSIONAL MEDICAL EDUCATION, INC.,

Petitioner,

v.

PALM BEACH COUNTY HEALTH CARE DISTRICT and JEFF DAVIS,

Respondents.

On Petition For Writ Of Certiorari To The Fourth District Court Of Appeals, State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a State of Florida court insulate a governmental tortfeasor from liability by application of a judicial doctrine (sovereign immunity), despite legislative action that has clearly waived sovereign immunity for negligence and intentional tort claims?

2. If not, does such action on the part of the Florida court violate the due process and equal protection rights under the United States Constitution of the person harmed by the government's tortious conduct?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fourth District Court of Appeals are those in the caption.

CORPORATE DISCLOSURE

Professional Medical Education, Inc., is a Florida for profit corporation, and its principal is Edward ("Ted") Young. No parent company holds 10% or more of Professional Medical Education's stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS, STATE OF FLORIDA

The Petitioner seeks a writ of certiorari to review the judgment of the Fourth District Court of Appeals, State of Florida, and of the Supreme Court of the State of Florida, which declined to review the former.

OPINIONS BELOW

The Opinion of the Fourth District Court of Appeals was rendered July 8, 2009 and is reported at 13 So.2d 1090 (Fla. 4th DCA 2009), App. 1. The Supreme Court of the State of Florida denied review without Opinion on March 30, 2010, Chief Justice Quince dissenting, and is reported at 2010 Fla. LEXIS 495 (2010), App. 24.

JURISDICTION

This Court has jurisdiction in accordance with 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amend. 14, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 768.28, Fla. Stat. (2010) Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be

brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued. However, any such action against a state university board of trustees shall be brought in the county in which that university's main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

. . .

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard

of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

. . .

STATEMENT OF THE CASE

Petitioner Professional Medical Education, Inc. ("PME") is an educational provider, owned by a

paramedic named Edward ("Ted") Young, that provides continuing education required for the re-certification of first responders and health care professionals such as EMTs, paramedics, firefighters, nurses and trauma surgeons. Petitioner claimed in this case that the Respondents, Defendants below, the Palm Beach County Health Care District ("District") and Dr. Jeff Davis, its medical director, defamed it, tortiously interfered with PME's prospective business relations with third parties, and engaged in a civil conspiracy with its competitors to destroy his business. A Palm Beach County jury, following a three (3) week trial, found in favor of the Petitioner on all claims against the Respondent District,[1] and awarded the Petitioner the sum of $692,400 in damages.[2] Following the denial of the District's post trial motions, an appeal to the Fourth District Court of Appeals ensued; a panel of the Fourth District held that ***all*** of Petitioner's claims were barred by the doctrine of "absolute immunity," and with that holding vacated the jury's verdict in favor of the Petitioner.

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[1] The trial court, Hon. Judge Jonathan Gerber, granted Davis a directed verdict on all claims, finding as a matter of fact and law that he had acted within the course and scope of his employment and thus was immune in accordance with §768.28(9)(a), Fla. Stat. Whether or not a government employee acts within or outside the course and scope of his employment under the foregoing statute is a question for the jury according to the Florida Supreme Court. *McGhee v. Volusia County*, 679 So.2d 729, 733 (Fla. 1996).

[2] A copy of the Verdict and Final Judgment are attached as App. 26, 12.

The Fourth District Court of Appeals also affirmed the cross appeal by the Petitioner which had questioned the propriety of granting Respondent Davis a directed verdict.[3]

The evidence, viewed in the light most favorable to the prevailing party at trial, Petitioner PME,[4] established the following facts: in the early part of 2000, PME was selected by Palm Beach County Fire Rescue to provide BTLS training (basic trauma life support services) to its 1,100 firefighters, and other courses that were to follow. It was a substantial amount of business for the fledgling company, amounting to $110,000 per year based on the agreed upon rate of $100 per Fire Rescue employee. In addition, PME was selected by the City of Greenacres, to provide similar training to a substantially smaller force of employees. The evidence showed that as a result of the selection of PME by Palm Beach County Fire Rescue, a series of events, orchestrated by the company's competitors, Todd Soard,[5] and Barry Duff conspired with their former colleague, Davis, then the Medical Director of the District, to interfere, through correspondence, phone calls and other communications, with PME's ability to put on BTLS courses. More specifically, as a result of false allegations made

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[3] The Fourth District's Opinion is attached as App. 1.

[4] *State Farm Mut. Auto Ins. Co. v. Austin Outdoor, Inc.*, 918 So.2d 446, 448 (Fla. 4th DCA 2006).

[5] He was then the owner and operator of a company called Emergency Educational Consultants of South Florida, Inc.

by Davis and Soard, that PME was being investigated for "fraud" by the District and/or Palm Beach County, PME's license and authority to conduct BTLS courses was suspended by the organization that authorized such training in the State of Florida, BTLS of Florida, Inc. BTLS was subsequently made aware of the background machinations that had led to the false allegations against PME, and assigned one of its Board members to conduct an investigation of the allegations made by Davis. PME was cleared of wrongdoing and was again eligible to fulfill its agreement with PBC Fire Rescue and Greenacres.

When Davis was frustrated in his efforts to disqualify PME by interfering with its ability to conduct BTLS courses, he then used a different stratagem to interfere in PME's business relations: he directly and by his own admissions at trial and deposition informed third parties which had selected PME that they could select any vendor to provide medical education services, but ***not*** PME. Davis was in a unique position to dictate terms to these third parties, as the District had taxpayer funds at its disposal to pay for medical training of employees of local governmental agencies in Palm Beach County, including PBC Fire Rescue and Greenacres. Young was told by these agencies that Davis would not permit them to use PME to provide these services; as a result, the business went to Young's competitors.

PME then filed suit against the District and Davis for tortious interference with business relations, defamation, civil conspiracy and negligent defamation

and prevailed on all claims permitted to be presented to the jury. App. 26. The District's post trial motions were denied, App. 14, the Trial Court entered judgment for the Petitioner based on the jury's verdict, App. 12, and the District subsequently appealed to the Fourth District Court of Appeals. The Fourth District reversed the judgment, vacated the jury's verdict, and denied the Petitioners' Motion for Rehearing and Rehearing *en banc*. A Petition for Review was denied by the Florida Supreme Court, which has limited jurisdiction to hear decisions of Florida's intermediate appellate courts, Chief Justice Quince dissenting. App. 24.

REASONS FOR GRANTING THE PETITION

Can a State court lawfully refuse to follow its own legislative waiver of sovereign immunity to defeat the claims of a party which prevailed at a trial? Can a State court, by judicial fiat, abrogate statutory law that waives sovereign immunity for claims against the State and its subdivisions, to the detriment of a party who has been damaged by the unlawful acts of the government, without offending due process and equal protection of the law, guaranteed under the Fourteenth Amendment to the United States Constitution? Do State courts have the authority to make up their own idiosyncratic "absolute immunity," to insulate Florida government entities from liability, when the State Legislature has itself waived such immunity? This Petition seeks guidance from this

Honorable Court on these very important issues that a Florida court answered in the affirmative, undoing a jury's verdict for the Petitioner.

The State of Florida has, by legislative action, abrogated sovereign immunity for all tort claims against the State and its political subdivisions, through enactment of § 768.28, Fla. Stat., which provides, in pertinent part, that a governmental entity is liable for the "negligent conduct or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under the circumstances in which the state or such agency of subdivision, if a private person, would be liable to the claimant." § 768.28(1), Fla. Stat. Stated simply, if a government entity causes damages to a person, the injured person may bring a claim against such entity, if a cause of action exists to remedy the wrong. Nevertheless, Florida courts continue to shield governmental wrong doers who damage citizens of this State by applying judicially created immunities that are of questionable pedigree and contrary to the clear legislative mandate; this results in a system of jurisprudence which provides for unequal protection of the law, *vis a vis* government tortfeasors and private tortfeasors. Moreover, given the unwillingness of Florida courts to apply the law as the Legislature has decreed, this results in a denial of due process to litigants injured by State government action. Petitioner here contends that the refusal of Florida courts to disavow these judicially created immunities that serve only to shield

governmental miscreants, violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Here, the Petitioner is a small medical education company, the Respondent District is an unelected government taxing authority created under the laws of the State of Florida. Ch. 87-450, Laws of Fla.; Chapter 2003-326, Laws of Florida, the Palm Beach County Health Care Act. Ch. 2003-326. The enabling legislation in effect at the time of the incidents giving rise to this case authorized the Respondent District to obtain liability coverage for itself and its employees, and provided that it had the power "(6) To sue and be sued in its own name and to plead and be impleaded, but with all sovereign immunity and limitations provided by the State Constitution or general law."

A panel of the Fourth District Court of Appeals in West Palm Beach, Florida held that the Petitioner could not keep its Judgment because the claim for defamation was barred by "absolute immunity," and since the claim for tortious interference failed as well,[6] the claim for civil conspiracy did not have an underlying tort to sustain itself.[7]

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[6] The District Court of Appeals said this claim also failed because: 1) The Respondent had a direct contractual relationship with the Petitioner, and hence could not interfere with its own contract. This is wholly contrary to the evidence which supported the jury's finding that the Respondent permitted third parties to contract for services with the Petitioner, and then interfered in the choices made by those third parties to contract

(Continued on following page)

It is undisputed that Florida has waived sovereign immunity for itself and its political subdivisions. The full relevant text of this legislative waiver of immunity provides:

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with the Petitioner. The foregoing was simply the Court of Appeals substituting its view of the evidence, which was disputed on this issue, for that of the jury, contrary to well established principles of Florida law. The Court went on to state however that the claim was also barred by the doctrine of absolute immunity, based on another Fourth District case expanding this doctrine to tortious interference claims. *See City of Stuart v. Monds*, 10 So.3d 1134, *rev. denied*, 23 So.3d 712 (Fla. 2009).

[7] The District Court of Appeals declined to apply a well recognized theory under Florida law, advanced by the Petitioner at trial and in defending the jury's verdict on appeal, that recognizes that even if there is no independent underlying tort to support the conspiracy, a civil conspiracy in and of itself can give rise to a viable cause of action. In *Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164 (Fla. 1958), the Florida Supreme Court held that a group of track operators who denied a Plaintiff the opportunity to race his dogs on their tracks for the purpose of driving him out of the dog racing business could be found liable for civil conspiracy, despite the fact that the Defendants owned the tracks that the Plaintiff would have to use and presumably contract with. The Florida Supreme Court said of this case that a civil conspiracy can itself be actionable without an independent underlying tort. *Execu-Tech Business Systems, Inc. v. New Oji Paper Company Ltd.*, 752 So. 2d 582, 586 n. 8 (Fla. 2000). *See also Churraca v. Miami Jai-Alai, Inc.*, 353 So. 2d 547 (Fla. 1977) (economic boycott theory of a civil conspiracy, which does not require underlying tort). Similarly, in an employment context, a claim for tortious interference stated a cause of action where a company who had hired a subcontractor, interfered with the plaintiff's employment relationship with the subcontractor. *McCurdy v. Collis*, 508 So. 2d 380 (Fla. 1st DCA 1987).

> ***In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts***, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment ***under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant***, in accordance with the general laws of this state, may be prosecuted subject to the [monetary caps may not be exceeded without a legislative claims bill] limitations specified in this act . . .

§ 768.28 (1), Fla. Stat. (Emphasis added).

Under Florida statutory law then, since at least the enactment of § 768.28, Fla. Stat., governmental wrongdoers are judged by legal standards applicable to private tortfeasors; that is, if there is a cause of action to redress the wrong against a private person, then there is a claim that can be made against the State government entity. Defamation, tortious interference with business relations, and civil conspiracy are all well recognized torts under the common law of

Florida, and the doctrine of "absolute immunity" has not been applied in cases involving private persons (or entities) that are defendants in those kinds of civil actions.[8]

In this case, the Fourth District Court of Appeals reversed a jury's verdict on the defamation claim by noting:

> On the defamation count, the circuit court properly granted Davis's motion for directed verdict under *McNayr*. That case held that "executive officials of government are absolutely privileged as to defamatory publications made in connection with the performance of the duties and responsibilities of their office." *McNayr*, 184 So. 2d at 433. The supreme court adopted a broad view of when a government official acts "within the orbit of his duties and responsibilities" so that absolute immunity applies. *Goetz v. Noble*, 652 So. 2d 1203, 1205 (Fla. 4th DCA 1995) (quoting *McNayr*, 184 So. 2d at 430). Davis was acting within the orbit of his duties and responsibilities when he wrote the February 23, 2000

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[8] There is a doctrine of absolute *privilege* applied to defamation claims, for example, to statements made in the course of a judicial proceeding. *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1111-12 (Fla. 2008). Chief Judge Gross has erroneously combined the doctrine of absolute privilege, not applicable to our facts, with the doctrine of sovereign immunity, resulting in a newly created shield which he called "absolute immunity." This newly created bar is contrary to the legislative waiver in § 768.28, Fla. Stat.

> letter. Because the liability of the District on the defamation count is predicated on its status as Davis's employer, the absolute immunity of Davis "necessarily requires the exoneration" of the District. *Saxon v. Knowles*, 185 So. 2d 194, 196 (Fla. 4th DCA 1966); see *Bauer v. City of Gulfport*, 195 So. 2d 571, 573 (Fla. 2d DCA 1967); *Murphy v. City of Aventura*, No. 08-20603-CIV, 2008 U.S. Dist. LEXIS 80647, at *30 (S D. Fla. Oct. 10, 2008); *Medina v. City of Hialeah*, No. 02-20957-CIV, 2003 U.S. Dist. LEXIS 4890 (S.D. Fla. Mar. 20, 2003). (footnote omitted). [Judge Gross also noted that the Court had extended "the doctrine of absolute immunity to bar an action for tortious interference with an advantageous business relationship against a City and its employees. *See City of Stuart v. Monds*, No. 4D08-4740, 10 So.3d 1134, 2009 Fla. App. LEXIS 4472 (Fla. 4th DCA May 13, 2009)."].

Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc., 13 So.3d 1090, 1095-96, *rev. denied*, 2010 Fla. LEXIS 495 (Mar. 30, 2010).

In just the past few months however, a different panel of the Fourth District Court of Appeal, which included Chief Judge Gross, *affirmed* an even more substantial verdict against a *private* sector defendant for substantially similar claims (slander and breach of contract) to the ones that the Petitioner prevailed in this case. *Lawnwood Med. Ctr., Inc. v. Sadow*, 2010 Fla. App. LEXIS 3813, *rev. denied*, 2010 Fla. LEXIS 673 (Fla. April 27, 2010). In *Lawnwood*, the doctrine

of sovereign immunity (called "absolute immunity" by Chief Judge Gross in our case) was not applied. Despite the waiver enacted by the Florida Legislature, this doctrine was applied in this case, resulting in inapposite decisions for substantially similar tortious conduct. This is a denial of due process and equal protection to the Petitioner, since Petitioner here was denied: 1) protection of the laws of Florida as enacted by the Legislature as a result of a court decision that ignores the statutory mandate; and 2) is being treated less than an equal since its injuries are not compensated in the same manner as if Petitioner were to have been damaged by a private sector tortfeasor. The Florida cases that shield government wrongdoers are not only contrary to the legislative mandate, but also ignore earlier precedent from the Florida Supreme Court[9] that repudiated the concept that the "king can do no wrong." The upshot

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[9] Recognizing that modern governmental entities can harm an innocent party to the same extent as a private tortfeasor, the Florida Supreme Court recognized some 52 years ago, that it had the power to, and in fact did, abolish the doctrine of sovereign immunity for claims involving local governmental entities. Even prior to legislation explicitly waiving sovereign immunity was enacted by the Legislature in 1972, suits against Florida municipalities for the wrongful conduct of its employees acting within the course and scope of their employment, have been permitted by the courts of Florida. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957). Justice Thornal writing for the Court abolished the judicially created doctrine of sovereign immunity holding the concept that "the king can do no wrong" "anachronistic" and out of date with "traditional concepts of democratic government." *Id.* at 130.

of all of this is that public defendants in Florida continue to receive a judicial pass despite the legislative directive that the judicial pass be abolished. This judicially created bar to claims, creates an incongruity that implicates the due process clause of the 14th Amendment, and, also, results in unequal protection of the laws, in violation of the equal protection clause of the 14th Amendment.

A State is free to waive sovereign immunity for itself. Once it does, the State's courts cannot hold to a common law created policy that has been abolished by legislative action, since that amounts to legislating from the bench, not a proper role for any court to engage in. Adherence to this judicial doctrine fails to recognize and to honor the legislative judgment that sovereign immunity should no longer be the law. Furthermore, this adherence results in inconsistent application of tort law predicated on the employment status of a defendant. Article XIV, § 1 of the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In this case, State of Florida courts persist in honoring a tradition that was created in feudal England where Kings held themselves as appointed by God; if appointed by God, the reasoning went, how can they possibly do any wrong that man can correct, through something as trifling as a trial? The early law courts of England, that abided by this doctrine, were not the King's equal, rather they were subservient to the King, serving the King's purposes, and therefore incapable of holding a self-proclaimed, divinely appointed authority accountable for transgressions of the law alleged by less divine persons.[10]

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[10] Blackstone's Commentaries explain:

The RIGHTS of PERSONS.

BOOK I.

Ch. 7.

myfteries of the bona dea, was not fuffered to be pried into by any but fuch as were initiated in it's fervice; becaufe perhaps the exertion of the one, like the folemnities of the other, would not bear the infpexion of rational and fober enquiry. The glorious queen Elizabeth herfelf made no fcruple to direct her parliaments to abftain from difcourfing of matters of ftateb; and it was the conftant language of this favorite princefs and her minifters, that even that auguft affembly "ought not to deal, to judge, or to meddle, with her majefty's prerogative royal c." And her fucceffor, king James the firft, who had imbided high notions of the divinity of regal fway, more than once laid it down in his fpeeches, that "as it is atheifm and blafphemy in a creature to difpute what the deity may do, fo it is prefumption and fedition in a fubject to difpute what a king may do in the height of his power: good chriftians, he adds, will be content with

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The United States of America arose under a wholly different tradition, and by virtue of its very inception repudiated the concept that the King was above the law, infallible or not subject to question or challenge.

Florida courts continued, if inconsistent, recognition of subservience to the government is contrary to modern legislative directive to waive all vestiges of immunity for the sovereign, at least insofar as tort law is concerned.[11] Florida's continued protection of

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God's will, revealed in his word; and good fubjects will reft in the king's will, revealed in his law d."

BUT, whatever might be the fentiments of fome of our princes, this was never the language of our antient conftitution and laws. The limitation of the regal authority was a firft and effential principle in all the Gothic fyftems of government eftablifhed in Europe; though gradually driven out and overborne, by violence and chicane, in moft of the kingdoms on the continent. We have feen, in the preceding chapter, the fentiments of Barcton and Fortefcue, at the diftance of two centuries from each other. And fir Henry Finch, under Charles the firft, after the lapfe of two centuries more, though he lays down the law of prerogative in very ftrong and emphatical terms, yet qualifies it with a general reftriction, in regard to the liberties of the people. "The king hath a prerogative in all things, that are not injurious to the fubject; for in them all it muft be remembered, that the king's prerogative ftretcheth not to the doing of any wrong e," Nihil

http://avalon.law.yale.edu/18th_century/blackstone_bk1ch7.asp

[11] Causes of action brought against the State in federal courts raise entirely different issues under 11th Amendment immunity. *See Board of Trustees v. Garrett*, 531 U.S. 356 (2001),

(Continued on following page)

the State prevents equal protection of the laws, since persons injured by government actors are treated less favorably than those injured by private actors. This continued obedience to a common law doctrine violates due process in that it ignores legislative repudiation of sovereign immunity, which legislation sought to hold the government equally accountable for its misdeeds as when judging the conduct of private tortfeasors. It is a doctrine that had been judicially abrogated, as in *Hargrove*, *supra*, and then legislatively abolished, per § 768.28, Fla. Stat., but remains an impediment that persists in shielding government wrongdoers, though they would be accountable if they worked in private enterprise.[12] As Justice Thornal said:

> Immunization in the exercise of governmental functions has been traditionally put on the theory that "the king can do no wrong but his ministers may". In applying this theory the courts have transposed into our democratic system the concept that the sovereign is divine and that divinity is beyond reproach. In preserving the theory they seem to have overlooked completely the

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abrogated by Tennessee v. Lane, 541 U.S. 509 (2004) (inapposite decisions on Congressional Article 5 power to enact Americans With Disabilities Act against States).

[12] Justice Thornal's excellent analysis in *Hargrove* questions the legitimacy of the application of the doctrine based on its history, not only in Florida, but tracing its origins back to England and the modern evolution of the common law.

> wrongs that produced our Declaration of Independence and in the ultimate resulted in the Revolutionary War. We, therefore, feel that the time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government.

Hargrove v. Town of Cocoa Beach, *supra*, 96 So.2d at 132.

This Court has said of *Hargrove* and the subsequent passage of § 768.28:

> The statute expanded the protections of sovereign immunity in some respects and narrowed it in others. *See Cauley v. Jacksonville*, 403 So. 2d 379 (Fla. 1981). Before the passage of § 768.28, the doctrine had been cast into serious doubt. We have previously noted that Florida led the States in the abrogation of municipal immunity:
>
> "The seminal opinion of the Florida Supreme Court in *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (1957), has spawned 'a minor avalanche of decisions repudiating municipal immunity,' which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions." *Owen v. City of Independence*, 445 U.S. 622, 646, n. 28 (1980) (citation omitted).

Howlett v. Rose, 496 U.S. 356, 364 n. 4 (1990).

Despite the clarity of the legislative waiver of immunity § 768.28, Fla. Stat., Florida courts continue, as here, for certain types of claims, to protect the purses of governmental tortfeasors, even when they egregiously damage private citizens and businesses.[13] This adherence to a doctrine that has been judicially questioned and legislatively repealed interferes with the right of litigants to have their meritorious claims, as here, considered under the same legal standards applicable for claims against private tortfeasors.[14] Thus meritorious claims that seek and result in jury verdicts for private claimants harmed by wrongful governmental conduct are set aside under dubiously resurrected judicial immunities, immunities that have been abrogated by legislative action and undermined

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[13] In this case, the Petitioner is a Florida corporation, which prevailed in a jury trial on claims of tortious interference with business relations, defamation and civil conspiracy, against the Respondent, a bureaucracy created by State law whose Board is not elected and is therefore not accountable to voters or any democratic process, Chapter 2003-326, Laws of Florida, the Palm Beach County Health Care Act. Ch. 2003-326, § 3, Laws of Fla., much like the "taxation without representation" that led to the original Tea Party, the Declaration of Independence from King George, and ultimately, the Revolutionary War.

[14] The Opinion of the Fourth District does not in any way question the sufficiency of the evidence to sustain the jury's verdict for the Petitioner on the defamation, tortious interference or civil conspiracy claims. Rather the Opinion holds that the first two claims are barred by "absolute immunity," and that the third claim fails because there is no underlying tort as a matter of law.

by earlier precedent. This violates the 14th Amendment due process rights under the United States Constitution of enterprises such as Professional Medical Education, Inc., since such litigants are deprived of the promise of the right to potential recovery as set forth by the Florida Legislature. Given the mandate of the Equal Protection Clause of the 14th Amendment to the United States Constitution, there is no valid reason why government tortfeasors should be treated more leniently than private tortfeasors, since the Florida statutory mandate compels otherwise. Yet in this case and others, Florida courts continue to ignore the legislative mandate for equality of treatment, and carve out judicially created exemptions, dubiously resurrected, that have the effect of immunizing governmental misconduct that is no longer immunized from suit.

Is there a federal remedy when a Florida court refuses to enforce a law that the Florida legislature has adopted? There certainly is and this Court's jurisprudence has recognized it, beginning with the concurring Opinion of former Chief Justice Rehnquist in the much debated decision in *Bush v. Gore*, 531 U.S. 98, 115-116 (2000). In *Bush v. Gore*, the Florida Supreme Court adopted a recount procedure in the aftermath of a close Presidential election. In the view of this Court, the Florida Supreme Court failed to follow the letter of Florida law, implicating a violation of due process rights, and, failed to treat citizens of each County in Florida equally when it came to the remedy decreed, since only some, not all, of Florida's

counties were ordered to conduct a manual recount of the ballots and engage in a process of dimple detection that had no statutory standards. As former Chief Justice Rehnquist, with Justices Scalia and Thomas, joining, explained in supporting the *per curiam* decision:

> This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

Id. at 115-116.

The same concerns are present in this case, although the concerns apply not to the grandeur of a national political office, but apply to a small business, the bedrock of the American economy and one of the cornerstones of our democracy, that was harmed by governmental action, and the failure of Florida courts to adhere to a legislative mandate that holds that government tortfeasors must be treated the same as private tortfeasors.

This Court has more recently, again, in a case arising in Florida, noted that due process and equal protection rights can be deprived by the actions of a court, not just by the actions of other branches of the government. In *Stop the Beach Renourishment, Inc. v.*

Fla. Dep't of Environmental Protection, 2010 U.S. LEXIS 4971 *42-43 (June 17, 2010) the Court determined it could in fact review whether due process was violated by a judicial decision in the takings context, rejecting arguments that it did not have the authority to make that determination. The Court held it does have the power to review state court decisions which arguably rely on state law when a court's construction of the law violates due process:

> Next, respondents argue that federal courts lack the knowledge of state law required to decide whether a judicial decision that purports merely to clarify property rights has instead taken them. ***But federal courts must often decide what state property rights exist in nontakings contexts, see, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577-578, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (Due Process Clause)***. And indeed they must decide it to resolve claims that legislative or executive action has effected a taking. For example, a regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." [citation omitted]. A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal

> courts unless they have the power to decide what property rights exist under state law.

Id. at *42-43 (emphasis added).

Although this Court's ultimate holding was that the Florida Supreme Court decision "did not contravene the established property rights of the petitioner's Members," *id.* at *55, the Court recognized that "[o]ur precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary." *Id.* at *6 (citations omitted). Analogously, in terms of settled expectations, § 768.28, Fla. Stat., clearly waives sovereign immunity for conduct that is actionable under Florida law against private persons, yet, Florida courts continue to fail to give effect to this waiver, and have, by way of judicial fiat, created a new type of protection for government tortfeasors which is sometimes called, as here, "absolute immunity." As the trial court recognized, the Hon. Jonathan Gerber,[15] the conflict between the case law and the statutory waiver of sovereign immunity had to be resolved by an appellate court or the legislature, but he was obligated to attempt to reconcile both:

> [COURT:] Here's the inconsistence or the gap. Resha versus Tucker and then going back to MCNayr and Wardlow in between all

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[15] Judge Gerber has since been elevated to the Fourth District Court of Appeals.

> say that if a public employee acts in a bad faith manner, makes a defamatory statement, he gets absolute immunity. End of story. And Resha said I make that determination before without giving that question to the jury.
>
> If he's in the scope, no matter how bad he says it, no matter how much ill will he has, he gets absolute immunity. That's the case law on the side. Then you got 768289-A [768.28(9)(a), Fla. Stat.], that says the District is liable if he's in the scope, but not liable if he's in bad faith, which creates the very question that I've just identified for you.
>
> ***The case law of Resha versus 76289-A [768.28(9)(a)]needs to be reconciled either by the legislature or by an appellate court. I'm bound to follow both.***
>
> But to the extent that when applied to the facts of this case, it would create again no remedy for the plaintiff, I agree that Question 1 should come out so that – and again, the defense is not even asking to make that argument anyway.

App. 18, Trial Transcript v. 5, p. 2089.

Instead addressing the obvious conflict between the legislative mandate and the old case law that was of dubious origin and legislatively overruled, the Opinion of the Fourth District, without any analysis, found that the claim for defamation was barred by "absolute immunity," rotely citing cases that Judge

Gerber distinguished during trial, but declining to resolve the obvious conflict between the cases and the statute. There is no doubt that sovereign immunity can be waived by a legislative body and Florida courts have repeatedly recognized the power of the legislature to have done so.

Beginning with *Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010 (Fla. 1979), a sea change occurred in governmental tort liability based on the waiver of sovereign immunity statute, § 768.28, Fla. Stat. In a seminal opinion that forever changed the case law created immunity foisted upon State governmental entities, the Court held that if the actions of the governmental entity were operational, as opposed to policy making, a governmental entity would be held to the same standards that a private individual would be held to for claims falling under the rubric of torts.

The Court however, noted that its holding, based on the recently enacted waiver of sovereign immunity law, impacted claims against a ***governmental entity***, and did not extend to individuals: "We do not deal here with personal immunity of individual officers acting in their official capacity. This distinct principle of law is explored in cases such as *McNayr v. Kelly*, 184 So.2d 428 (Fla. 1966)." *Id.* at 1013, n.1. This distinction is precisely the distinction that Judge Gerber made in permitting the jury to decide the defamation claim against the District. App. 20, v. 5, p. 2099, Trial Transcript. While Judge Gerber granted the Motion for a Directed Verdict on this claim in favor of Davis,

the *McNayr* holding was expressly limited to claims against ***government officials*** who act in their official capacity, and did not apply as a bar to a claim against the governmental entity itself, since that issue was not before the Court. This makes perfect sense since, as *Commercial Carrier* recognizes, the waiver of sovereign immunity statute was enacted in 1973 (Chapter 73-313) and was amended in 1974 (74-235), *Id.* at 1012, and *McNayr* was decided *before* sovereign immunity was legislatively waived. *McNayr*, therefore, was limited to immunizing individuals, and was not applied to governmental entities.

The progeny of *Commercial Carrier* have recognized the effects of the legislative waiver of sovereign immunity on the operational conduct of a governmental entity that results in injury to a member of the public. In Florida, a governmental entity is liable for the "negligent conduct ***or wrongful act*** or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under the circumstances in which the state or such agency of subdivision, ***if a private person, would be liable to the claimant***." Section 768.28(1), Fla. Stat. (emphasis added). The Florida Supreme Court has repeatedly given effect to the plain and unambiguous legislative enactment and has construed this waiver provision to include all torts, even those that are intentionally committed and wrongful, and not merely those that are negligent. *See*: *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989) (detention of motorist and placing him in dangerous situation,

resulting in injury, is an operational function for which sovereign immunity has been waived by legislative enactment); *McGhee v. Volusia County*, 679 So.2d 729 (Fla. 1996) (handcuffed prisoner beaten by deputy without apparent provocation results in municipal liability if officer acting within course and scope of employment; it is a jury question whether government employee acts within or outside course and scope of employment).

Therefore, if a private person committed the act (or omission) against the person claiming injury, and if a cause of action exists to remedy the wrong against a private person, the governmental entity is in the same shoes as a private tortfeasor, and under the legislative mandate, liable up to the limits set forth in the statute. In other cases not involving defamation and tortious interference, the Fourth District has followed the plain language of the statutory waiver. *See*: *Cunningham v. City of Dania*, 771 So.2d 12, 14 (Fla. 4th DCA 2000) ("In the instant case, similar to *Woodson*, we find that the City had the same duty as a private party would have in maintaining and operating the premises of Modello Park."); *City of Belle Glade v. Woodson*, 731 So.2d 797, 798 (Fla. 4th DCA 1999) (City had "the same common law duty as a private person to properly maintain and operate the property" on which the plaintiff allegedly was injured).

As the Florida Supreme Court explained in *Kaisner*, *supra*, "governmental immunity derives ***entirely*** from the doctrine of separation of powers, ***not from a***

duty of care or from any statutory basis." *Id.* at 737 (emphasis added), *citing* Article III, § 3, Florida Constitution. Therefore, sovereign immunity only bars claims which would compel "the judiciary, by way of tort law, ***to intervene in fundamental decisionmaking*** of the executive and legislative branches of government, the agencies and municipal corporations they have created." *Id.* (emphasis added). *Kaisner*, therefore, recognizes that a claim of immunity has no application where the governmental decision challenged is a "***secondary decision as to how [governmental] policies or plans will be implemented.***" *Id.* (Emphasis added), which is "operational" and not endowed with immunity:

> An 'operational' function, on the other hand, is not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to ***how*** those policies or plans will be implemented.

Kaisner, *supra*, 543 So.2d at 737; *Henderson v. Bowden*, 737 So.2d 532 (Fla. 1999). *Kaisner* made clear that while all governmental acts involve some "degree of discretion[,]" the government's secondary decisions as to how it implements its policies by and through enforcement is not immune. Sovereign immunity does not prevent challenges to how the government enforces, or implements, its policies because such challenges do not compel the courts to make policy: "[i]ntervention of courts in this case will not entangle them in fundamental questions of public policy or planning. ***It merely will require the***

courts to determine if the officers should have acted in a manner more consistent with the safety of the individuals involved." *Kaisner*, 543 So.2d at 737-738 (emphasis added).

Florida courts, for negligence claims involving operational conduct, generally have no difficulty finding that the Legislative waiver of sovereign immunity provides a resounding answer that there is liability. But despite the fact that claims for defamation and for tortious interference are well recognized against private actors under Florida law, Florida courts, as in this case, continue to have difficulty understanding that a waiver of immunity applies to all claims that are viable against private sector defendants. This failure has resulted in a jury's verdict being vacated, and the decision of the Fourth District Court of Appeals has violated the settled expectations of the Petitioner to have a Florida law enforced as it was written. For these reasons, the Petitioner respectfully requests that this Court hold that the Fourth District's failure to apply the law as it was written and intended violated Petitioner's due process and equal protection rights under the United States Constitution.

CONCLUSION

When a State waives sovereign immunity, for itself and its agencies, courts of that state are not empowered to preserve the judicial doctrine, even if the court calls it by a different name, in this case, "absolute immunity." The judicially created doctrine that the King can do no wrong has evolved in the Western World to near extinction, with a substantial push from the United States of America, a Nation founded, in substantial part, because of the recognition that a particular monarch, King George, had indeed wronged his colonists, who, in turn, risked all they had, to seek independence and freedom from European style tyranny. From this historical backdrop we come to this case, a small business that for wholly improper and unjust reasons was the target of government retribution, from an unelected fiefdom with taxing authority that sought to destroy it. A jury of the parties' peers found the government had violated PME's rights, and by their verdict, clearly and convincingly told the government it was wrong. An intermediate district court of appeal in the State of Florida, then flouted the Legislative will, and resurrected a judicial doctrine that the elected representatives of the people abolished. Judge Gross' Opinion calls sovereign immunity "absolute immunity," conflating two distinct legal doctrines that serve different purposes into a hybrid that serves neither. But a horse of a different color is still a horse, and tramples the rights vested by the Legislature for persons such as Mr. Young whose business PME was

nearly destroyed by the actions of the government. And this Court is Mr. Young's last hope that his right to do business without unlawful interference from the government, and without being tarred and feathered by unelected bureaucrats such as Respondents, can be redeemed. The decision of the Fourth District Court of Appeals violates the due process and equal protection rights of PME and this Court is respectfully requested to correct that injustice by reversing the Fourth District's decision and reinstating the jury's Verdict.

Respectfully submitted,

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PALM BEACH COUNTY HEALTH CARE DISTRICT,
Appellant,
v.
PROFESSIONAL MEDICAL EDUCATION, INC.,
Appellee/Cross-Appellant,
v.
JEFF DAVIS, Cross-Appellee.

No. 4D07-4170

COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

13 So. 3d 1090; 2009 Fla. App. LEXIS 9167;
34 Fla. L. Weekly D 1379

July 8, 2009, Decided

COUNSEL: Robert Rivas of Sachs Sax Caplan, P.L., Tallahassee, for appellant, and cross-appellee, Jeff Davis.

Isidro M. Garcia of Garcia Law Firm, P.A., West Palm Beach, for appellee/cross-appellant.

JUDGES: GROSS, C.J. WARNER and CIKLIN, JJ. concur.

OPINION BY: GROSS

OPINION

GROSS, C.J.

The Palm Beach County Health Care District appeals a final judgment entered after a jury verdict. The jury awarded damages on three legal theories – tortious interference with a business relationship, defamation, and conspiracy to commit defamation

and tortious interference. Each of these causes of action is derailed by a significant legal obstacle. A necessary element of tortious interference is absent and absolute immunity precludes defamation. Without the anchor of these torts, there is no compensable conspiracy. Therefore, we reverse the final judgment.

The District is a creation of statute, Chapter 2003-326, Laws of Florida, the Palm Beach County Health Care Act. Ch. 2003-326, § 3, Laws of Fla. Explicitly setting forth its intent, the Legislature recognized that it was "in the public interest . . . to maximize the health and well-being of Palm Beach County residents by providing comprehensive planning, funding, and coordination of health care service delivery." *Id.* at section 3, § 2. As a goal, the Act states that "[a]ll programs should be coordinated to maximize the delivery of quality health care." *Id.* The District's board "is vested with the authority and responsibility to provide for the comprehensive planning and delivery of adequate health care facilities . . . and services." *Id.* at section 3, § 6. Among the enumerated powers of the Board all specified in section 3 of the Act are:

> a) the power "to provide services . . . jointly with other public or private health care providers, with appropriate provision to reduce the costs of providing service for all users thereof", § 6(2);
>
> b) the power to "sue and be sued in its own name . . . but with all sovereign immunity

> and limitations provided by the State Constitution or general law", § 6(6);
>
> c) the power to "borrow money and issue bonds . . . [and] to levy such tax as may be authorized", § 6(12);
>
> d) the power to "contract with other governmental agencies or private individuals or entities as may be necessary, convenient, incidental, or proper in connection with any of the powers, duties, or purposes authorized by" the Act, § 6(18); and
>
> e) the power to "establish criteria for the provision of health care pursuant to this act", § 6(25).

See also Ch. 87-450, § 3, Laws of Fla. (earlier version of enabling legislation).

One of the programs established by the District was designed to enhance the medical skills of emergency medical services ("EMS") personnel. To set up a course under the program, an educational provider would arrange with an EMS agency to present a course on a specified date and secure advance approval from the District for the course. After a provider presented the course for the EMS agency, it would receive payment directly from the District, once it had submitted certain documentation.

Dr. Jeff Davis was the District's Trauma Agency director. The plaintiff below, appellee Professional Medical Education, Inc. ("PME"), was a vendor of continuing education courses for EMS personnel. Ted

Young was the owner of PME. The continuing education courses were required for EMS personnel to maintain their professional certifications. Under the District's program, PME's contract framework was to enter into an agreement with a Palm Beach County EMS agency to conduct educational programs for employees and then to invoice the District after the courses were provided.

The defamation count was based on a February 23, 2000 letter about PME that Davis wrote to Basic Trauma Life Support of Florida, Inc., an organization that sanctions and oversees medical training courses. Before he sent the letter, Davis and Young had butted heads over necessary documentation for reimbursement. PME contended that this letter was part of a conspiracy between Davis and PME's competitors in delivering educational programs to damage PME's business.[1] As a result of the letter, Basic Trauma temporarily suspended PME's certification pending further investigation.

The tortious interference count focused on PME's relationship with Palm Beach County Fire Rescue,

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[1] PME's theory was that Davis was involved in a conspiracy with Todd Soard and Barry Duff, competitors of PME. In a previous case, PME sued Soard and Duff for tortious interference, defamation, and civil conspiracy. Duff filed for bankruptcy before trial and PME obtained a final judgment against Soard. Soard later discharged PME's judgment in bankruptcy. The jury did not know about this background to the case or that PME filed against the District only after the bankruptcies of Soard and Duff precluded any recovery from them.

which had 1,100 employees who needed training, and the City of Greenacres, a smaller client. After PME contracted with Greenacres and Palm Beach County Fire Rescue to put on seminars, Davis told both entities that the District would not make payments for the courses. Both courses were put on "hold." PME contended that the District's institution of a formal bidding procedure and the creation of an approved vendor list was part of the conspiracy to deprive PME of business. PME did not submit a proposal in response to the District's published invitation for bid.

At trial, the circuit court granted Davis's motion for directed verdict on the defamation count, ruling that the undisputed facts demonstrated that Davis was acting within the scope of his employment with the District when he sent the February 23, 2000 letter, so that he was protected by absolute immunity under *McNayr v. Kelly,* 184 So. 2d 428, 433 (Fla. 1966). The court rejected the District's argument that it too was immune from suit under *McNayr*.

The jury found against the District on the defamation, tortious interference, and conspiracy claims and awarded $692,400 in damages.

The recovery on the tortious interference count fails because the District's "interfering" conduct was not unjustified, a required element of the tort.

The elements of tortious interference with a business relationship are: "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal

rights; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the interference." *See Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 385 (Fla. 4th DCA 1999). "For the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship." *Id.* at 386; *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1294 (11th Cir. 2001). A defendant is not a "stranger" to a business relationship if the defendant "has any beneficial or economic interest in, or control over, that relationship." *Nimbus Tech., Inc. v. Sunndata Prods., Inc.*, 484 F.3d 1305, 1309 (11th Cir. 2007) (quoting *Tom's Foods, Inc. v. Carn*, 896 So. 2d 443, 454 (Ala. 2004)).

Under Florida law, a defendant is not a stranger to a business relationship, and thus cannot be held liable for tortious interference, when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed.

In *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. 3d DCA 1980), a guarantor of a loan between a bank and a borrower was held to be a "party" to that loan contract, so that the guarantor could not be held liable for the tort of interfering with the contract. Similarly, in *United of Omaha Life Insurance Co. v. Nob Hill Associates*, 450 So. 2d 536, 539 (Fla. 3d DCA 1984), the court held that the future purchaser of a mortgage broker's loan to a borrower was a "party" to

that contract, so that the borrower could not maintain an action against the purchaser for tortiously interfering with the loan contract.

The case most similar to this one is *Genet Co. v. Annheuser-Busch, Inc.*, 498 So. 2d 683 (Fla. 3d DCA 1986). There the plaintiffs contracted with a beer wholesaler to purchase the wholesalership. The wholesaler's agreement with Annheuser-Busch required Annheuser's approval for a transfer of the business. Annheuser did not approve the transfer. The plaintiff sued Annheuser for interfering with their contract with the wholesalership. The third district affirmed a summary judgment for Annheuser, holding that it was a "party to the business relationship allegedly interfered with"; Annheuser's contractual right "to approve or disapprove any proposed transfer" rendered it an interested third party to the plaintiffs' agreement. *Id.* at 684.

Like Annheuser in *Genet,* the District was not a stranger to PME's business relationships with Palm Beach County Fire Rescue and Greenacres, but was an interested third party. The District was the source of funds to pay for the services PME was to provide. Under the law of tortious interference, the District is not a "stranger" to any contract that it ultimately will fund. As the caretaker of public money raised by taxes, the District has an interest in insuring that public funds are spent for a proper purpose and in seeing that the money is spent wisely and prudently. To allow the tort of interference to apply in this case would be to discourage the District from being an ag-

gressive caretaker of public funds. Application of the tort to a situation involving a governmental agency's expenditure of funds "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.) (in which court discussed the doctrine of absolute immunity for the executive branch of government); *see McNayr,* 184 So. 2d at 431 n.12 (quoting *Gregoire* with approval). For this reason, PME could not maintain a cause of action for tortious interference against the District.

This holding is consistent with the rationale behind the tort. The cause of action for tortious interference with a business relationship "recognizes that economic relations are entitled to freedom from unreasonable interference." *United Yacht Brokers, Inc. v. Gillespie,* 377 So. 2d 668, 672 (Fla. 1979). The point of a business relationship is to advance the interests of the parties involved. Tortious interference protects the interests of parties to an agreement against interference by outsiders, who would not be liable otherwise for breach. In the case of an interested third-party, the contractual interests that tortious interference is intended to protect *include* the interests of the third-party with respect to the contract. *See* 2 Dan B. Dobbs, *The Law of Torts,* § 449 (2001); Restatement (Second) of Torts § 769 (1979). An interested third-party accused of tortious interference is essentially "interfering" with its own

interests. This is not interference; it is freedom of contract.

PME points to *American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.*, 810 So. 2d 996 (Fla. 4DCA 2002), but that case is distinguishable. There we held that even though the defendant "had a relationship" with the plaintiff, the defendant could be held liable for interfering with the plaintiff's relationships with its customers. *Id.* at 999. Crucial to this holding in *American National* was the fact that the "relationships" interfered with were unrelated to the "relationship" between the plaintiff and defendant. In this case, the District had a direct connection to the crucial relationships – it was the ultimate source of funds for the seminars PME intended to give.

The fact that Davis may have harbored some "personal malice or ill-will" towards PME and Taylor does not transform this case into one for tortious interference. Because it was not a stranger to the crucial business relationships, the District's acts did not amount to unjustified interference. As the Florida Supreme Court wrote in the first case that recognized the tort of interference,

> [w]here one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice, or other bad motive towards another, does not give the latter a right of action against the former.

Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 938 (Fla. 1887) (quoted in *Ethyl Corp.*, 386 So. 2d at 1225).

On the defamation count, the circuit court properly granted Davis's motion for directed verdict under *McNayr.* That case held that "executive officials of government are absolutely privileged as to defamatory publications made in connection with the performance of the duties and responsibilities of their office." *McNayr,* 184 So. 2d at 433. The supreme court adopted a broad view of when a government official acts "within the orbit of his duties and responsibilities" so that absolute immunity applies. *Goetz v. Noble,* 652 So. 2d 1203, 1205 (Fla. 4th DCA 1995) (quoting *McNayr,* 184 So. 2d at 430). Davis was acting within the orbit of his duties and responsibilities when he wrote the February 23, 2000 letter. Because the liability of the District on the defamation count is predicated on its status as Davis's employer, the absolute immunity of Davis "necessarily requires the exoneration" of the District. *Saxon v. Knowles,* 185 So. 2d 194, 196 (Fla. 4th DCA 1966); *see Bauer v. City of Gulfport,* 195 So. 2d 571, 573 (Fla. 2d DCA 1967); *Murphy v. City of Aventura,* No. 08-20603-CIV, 2008 U.S. Dist. LEXIS 80647, at *30 (S.D. Fla. Oct. 10, 2008); *Medina v. City of Hialeah,* No. 02-20957-CIV, 2003 U.S. Dist. LEXIS 4890 (S.D. Fla. Mar. 20, 2003).[2]

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[2] We note that another panel of this court recently applied the doctrine of absolute immunity to bar an action for tortious

(Continued on following page)

Since the counts regarding the goals of the conspiracy – defamation and tortious interference – fail, so too the conspiracy count must fail. "The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which results in damage to the plaintiff." *Liappas v. Augoustis,* 47 So. 2d 582, 582 (Fla. 1950). "An act which does not constitute a basis for an action against one person cannot be made the basis of a civil action for conspiracy."[3] *Buckner v. Lower Fla. Keys Hosp. Dist.,* 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981); *Liappas,* 47 So. 2d at 582; *see Days v. Fla. E. Coast Ry. Co.,* 165 So. 2d 434, 435 (Fla. 3d DCA 1964).

For these reasons, we reverse the final judgment in favor of PME and remand to the circuit court for the entry of a final judgment in favor of the District.

WARNER and CIKLIN, JJ., concur.

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interference with an advantageous business relationship against a City and its employees. *See City of Stuart v. Monds,* No. 4D08-4740, 10 So. 3d 1134, 2009 Fla. App. LEXIS 4472 (Fla. 4th DCA May 13, 2009). This would be a separate ground supporting a judgment for the District on the tortious interference count.

[3] This case does not fall within the exception to the general rule, where no civil wrong is the object of the conspiracy, but "the mere force of numbers, acting in unison, or other exceptional circumstances, gives rise to an independent wrong. In such cases the conspiracy itself becomes the gist of the action." *Liappas,* 47 So. 2d at 583; *Snipes v. W. Flagler Kennel Club, Inc.,* 105 So. 2d 164, 165 (Fla. 1958).

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

PROFESSIONAL MEDICAL EDUCATION, INC.,

Plaintiff,

vs.

PALM BEACH COUNTY HEALTH CARE DISTRICT and JEFF DAVIS,

Defendants. /

CASE NO.: 2004CA001645

JUDGE GERBER

FINAL JUDGMENT

Pursuant to the verdict rendered in this action

IT IS ADJUDGED that plaintiff, PROFESSIONAL MEDICAL EDUCATION, INC., recover from defendant, PALM BEACH COUNTY HEALTH CARE DISTRICT, the sum of $692,400.00 (SIX HUNDRED AND NINETY TWO THOUSAND FOUR HUNDRED DOLLARS), that shall bear interest at the legal rate of 11 percent a year, for which let execution issue.

The Court reserves jurisdiction to consider Plaintiff's request for a reasonable attorney's fees and costs upon filing of a motion and hearing.

DONE AND ORDERED at West Palm Beach, Florida this 9th day of Oct, 2007.

/s/ Jonathan D. Gerber
HONORABLE JONATHAN D. GERBER
JUDGE, CIRCUIT COURT

Copies furnished: Isidro M. Garcia, 224 Datura Street, Suite 900, West Palm Beach, Florida 33401; Barbara Sonneborn and Minnie Urbanek, SONNEBORN, RUTTER et al., P.A., 1545 Centrepark Drive North, West Palm Beach, Florida 33401; Robert Rivas, SACHS SAX KLEIN, 200 W. College Avenue, Suite 216, Tallahassee, Florida 32301

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

PROFESSIONAL MEDICAL EDUCATION, INC.,	CIRCUIT CIVIL DIVISION "AB"
Plaintiff,	CASE NO. 502004CA001645 XXXXMB
vs.	
PALM BEACH COUNTY HEALTH CARE DISTRICT, et al.,	
Defendants. /	

ORDER DENYING DEFENDANT PALM BEACH COUNTY HEALTH CARE DISTRICT'S POST-TRIAL MOTIONS

THIS CAUSE came before this Court on Defendant Palm Beach County Health Care District's post-trial motions. This Court has reviewed Defendant's motions, memorandum of law, case authority, and supplemental case authority. This Court also has reviewed Plaintiff's memorandum of law in response. This Court also has considered the parties' arguments, and is otherwise fully advised in the premises. Based on the foregoing, it is ORDERED AND ADJUDGED:

1. Defendant's Motion for New Trial is DENIED.

2. Defendant's Renewed Motion to Strike Trial Testimony of Barry Duff and Todd Soard is DENIED.

3. Defendant's Motion for Remittitur is DENIED.

4. Defendant's Renewed Motion for Directed Verdict or Alternatively for JNOV is DENIED.

DONE AND ORDERED at Palm Beach County, Florida, this 18th day of September, 2007.

/s/ Jonathan D. Gerber
Jonathan D. Gerber
Circuit Court Judge

[2053] IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

PROFESSIONAL MEDICAL EDUCATION, INC.,	CIRCUIT CIVIL DIVISION "AB"
Plaintiff,	CASE NO. 502004CA001645 XXXXMB
v.	
PALM BEACH COUNTY HEALTH CARE DISTRICT and JEFF DAVIS,	
Defendants. /	

Palm Beach County Courthouse
205 N. Dixie Highway
West Palm Beach, FL
July 2, 2007
9:30 a.m.

The above-entitled cause came on for TRIAL before the HONORABLE JONATHAN D. GERBER, Judge of the Circuit Court, at the Palm Beach County Courthouse, 205 N. Dixie Highway, West Palm Beach, Florida on the 2nd day of July, 2007 commencing at or about 9:30 a.m.

* * *

[2089] disagreement. I got to make a ruling.

The ruling to Question 1 comes out. Here's why. And I thought about this last night after I sent it out to you.

If Question 1 were to be answered to the jury that Dr. Davis while acting in the course and scope of his employment acted in bad faith, thereby entitling the District to immunity under 76289-A, that PME is without a remedy. That to me is a mischaracter of justice as a matter of law.

I suppose Ms. Sonneborn, Ms. Urbanek, Mr. Rivas could have come in here today, you know, Judge, now that you've granted a directed verdict for Dr. Davis and under the statute, if Dr. Davis was in the scope, but in bad faith, the Health Care District wins, we're going to get up in closing and say, you know, Dr. Davis actually did this all in bad faith. And if he did that in bad faith, the Health Care District is out.

I wouldn't anticipate Ms. Sonneborn doing that, but again I think what's happened here is that there – that the parties to this case have identified a gap in the law that this Court cannot remedy. The legislature and the appellate court can, but this Court cannot.

Here's the inconsistence or the gap. Resha versus Tucker and then going back to McNayr and Wardlow in [2090] between all say that if a public employee acts in a bad faith manner, makes a defamatory statement, but is within the scope of making that statement, he gets absolute immunity. End of story. And Resha said I make that determination before without giving that question to the jury.

If he's in the scope, no matter how bad he says it, no matter how much ill will he has, he gets absolute immunity. That's the case law on the one side.

Then you got 768289-A that says the District is liable if he's in the scope, but not liable if he's in bad faith, which creates the very question that I've just identified for you.

The case law of Resha versus 76289-A needs to be reconciled either by the legislature or by an appellate court. I'm bound to follow both.

But to the extent that when applied to the facts of this case, it would create again no remedy for the plaintiff, I agree that Question 1 should come out so that – and again, the defense is not even asking to make that argument anyway.

Let me go through the rest of the arguments that were made.

Plaintiff's argument is that Question 1 is a [2091] compound question. That is now moot because I'm just going to make it having to do with the February 23rd letter.

MS. SONNEBORN: I thought you were taking Question 1 out.

THE COURT: I'm sorry, what will be the new Question 1.

MS. SONNEBORN: Okay.

THE COURT: Which is the defamation issue.

MS. SONNEBORN: Okay.

THE COURT: The first question of the defamation issue.

And the following questions within the defamation which makes reference to all three statements would also be changed accordingly.

By the way, in case you're wondering where did the Judge come up with that, putting all three statements together, is because it was initially pled that way in the second amended complaint.

If you go back and look at paragraph 12, it lumps together communications to Greenacres and Fire-Rescue. And then it incorporated paragraphs 1 through 12 in the defamation Count, it incorporates those in the tortious interference, Count 2. And that's how BTLS ended up in the tortious interference, count 2.

* * *

[2099] instruction. Again, both – the plaintiff thinks it should come out, the defense thinks it should come in. I go with the standard, the plaintiff's objection is overruled.

Turning now to the defense objections, I've already said I'm going to change up the defamation.

On the next objection that by giving a directed verdict to Dr. Davis necessarily means a directed verdict on behalf of the Health Care District for the same absolute immunity, that defense objection is overruled.

I went back and looked carefully at each of the cases that the defense relief, Resha, Wardlow, McNayr, there's one other case, and not a single one of those cases, not a single one involved any finding that the governmental entity was also entitled to recover – was entitled to be absolved on absolute immunity. In fact, three of those four cases, the governmental entity was not even named as a defendant. It was only the individual public employee.

The only case where the governmental entity was named as a defendant was the city – was the Wardlow car, and there was no mention whatsoever seeking absolute immunity on behalf of the City of Miami. The only party that was seeking immunity in that case, [2100] absolute immunity, was – I think his name was Ted Murphy, so that's why the Health Care District is still on this verdict form.

And frankly again, it ought to be on this verdict form because otherwise PME would be without a remedy in a situation where a public employee allegedly within the scope also is allegedly acting in bad faith. There has to be some remedy as a matter of law.

Let's see. Next, no tortious interference for BTLS. Again, that's not agreed to here. And, in fact, if you go

back and look at the pleading in this case, that has always been pled. Paragraphs 6 through 9 are the ones that talk about the communication with BTLS. Paragraph 10 is the one that says there will be separate communications with Greenacres and Fire-Rescue.

But when you look at the tortious interference, 1 through 12 are all incorporated. And then within that count, paragraph 18, it says the defendants intentionally and unlawfully interfered with plaintiff's licensing authority and the plaintiff's clients and prospective clients. Two separate alleged tortious interferences separated by the conjunctive word "and." And that's why I'm leaving BTLS in the tortious interference.

[2101] The defense's argument that the defamation instruction is insufficient because it doesn't require the plaintiff to prove falsity and negligence is overruled.

If you look at comments to the defamation instructions, MI 4. blank, subnote 4, the First Amendment requires plaintiff to prove falsity in MI 4.1 and 4.2.

Defendant must prove truth in MI 4.3 cases because the common law presumes any statement made was defamed and, in fact, was false.

Okay. And then down below as I put in my e-mail, cases invovling nonmedia defendants and all

cases that fall under MI 4.3 which makes no reference to negligence.

Again this is a case involving a private claimant and a nonmedia defendant, therefore falsity is not the plaintiff's burden. Negligence in not the plaintiff's burden. In fact, negligence according to the comment is not an issue whatsoever.

The plaintiff just has to show that the statements that the February 23rd, 2000 letter intended to injure business reputation, then the burden shifts to the truth and good motives to the defense under 4.3. And I got it verbatim under 4.3.

[2102] The argument that there's no factual basis for the jury question on the privilege, that objection is overruled. There is a prima fascia. That's an issue of fact for the jury.

And the issue of overt act, I went back and looked back at – because each side cited different case law on the conspiracy elements. Coincidently when you trace those cases back on each side, they all come back to the one case, the Fourth DCA case called Bond versus Koscot. And Bond versus Koscot which is a Fourth DCA case, it says overt act.

It doesn't describe what that overt act means, what the word means. It just says overt act. And I'll stick with the Fourth DCA on that, so those are to sum up the changes that I'm going to be making is eliminating Question 1 altogether and eliminating from the corresponding jury instruction the instruction

regarding 76828 other than telling them that Dr. Davis got a directed verdict in his favor and not that term.

Changing the defamation to relate only to the February 23rd letter and changing the property of PME to rights of PME.

Ms. Sonneborn, you have a question?

MS. SONNEBORN: Yes. I have one clarification on page 3 with the jury instructions concerning that first

* * *

Supreme Court of Florida

TUESDAY, MARCH 30, 2010

CASE NO.: SC09-1810

Lower Tribunal No(s).: 4D07-4170,
502004CA001645XX

PROFESSIONAL MEDICAL EDUCATION, INC.	vs.	PALM BEACH COUNTY HEALTH CARE DISTRICT, ET AL.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.

QUINCE, C.J., dissents.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bm
Served:
ISIDRO M. GARCIA
BARBARA W. SONNEBORN
ROBERT RIVAS
SHARON BIDKA URBANEK
HON. SHARON BOCK, CLERK
HON. JONATHAN DAVID GERBER, JUDGE
HON. MARILYN BEUTTENMULLER, CLERK

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

PROFESSIONAL MEDICAL EDUCATION, INC.,	CIRCUIT CIVIL DIVISION "AB"
Plaintiff,	CASE NO. 502004CA001645 XXXXMB
v.	
PALM BEACH COUNTY HEALTH CARE DISTRICT,	
Defendant. /	

VERDICT

We, the jury, return the following verdict:

Defamation Issues

1. Did the statements in the February 23, 2000 letter to BTLS tend to injure Professional Medical Education, Inc. in its business or reputation?

YES X NO ____

If your answer to question 1 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s defamation claim, and you should skip questions 2 through 4, and answer question 5. If your answer to question 1 is YES, please answer question 2.

2. Were the statements in the February 23, 2000 letter to BTLS substantially true and made with

good motives by the Palm Beach County Health Care District?

YES _____ NO __X__

If your answer to question 2 is YES, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s defamation claim, and you should skip questions 3 and 4, and answer question 5. If your answer to question 2 is NO, please answer question 3.

3. Did the Palm Beach County Health Care District have a privilege to make the statements in the February 23, 2000 letter to BTLS?

YES __X__ NO _____

If your answer to question 3 is NO, your verdict is for Professional Medical Education, Inc. on its defamation claim, and you should skip question 4, and answer question 5. If your answer to question 3 is YES, please answer question 4.

4. Did the Palm Beach County Health Care District abuse any privilege it may have had in making the statements in the February 23, 2000 letter to BTLS?

YES __X__ NO _____

If your answer to question 4 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s defamation claim. If your answer to question 4 is YES, your

verdict is for Professional Medical Education, Inc. on its defamation claim. Please answer question 5.

Tortious Interference Issues

5. Did the Palm Beach County Health Care District intentionally interfere with Professional Medical Education, Inc.'s existing business relations with BTLS and/or prospective business relations with the Palm Beach County Fire Rescue Department and/or the City of Greenacres?

YES X NO _____

If your answer to question 5 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s tortious interference claim, and you should skip question 6, and answer question 7. If your answer to question 5 is YES, please answer question 6.

6. Did the Palm Beach County Health Care District act properly in interfering as it did with Professional Medical Education, Inc.'s existing business relations and/or prospective business relations?

YES _____ NO X

If your answer to question 6 is YES, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s tortious interference claim. If your answer to question 6 is NO, your verdict is for Professional Medical Education,

Inc. on its tortious interference claim. Please answer question 7.

Civil Conspiracy Issues

7. Was there an agreement between the Palm Beach County Health Care District, acting through Jeff Davis, and Todd Soard and/or Barry Duff?

YES X NO _____

If your answer to question 7 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s civil conspiracy claim, and you should skip questions 8 through 10, and go to question 11, If your answer to question 7 is YES, please answer question 8.

8. Was the agreement to defame Professional Medical Education, Inc. and/or tortiously interfere with Professional Medical Education, Inc.'s existing business relations with BTLS and/or prospective business relations with the Palm Beach County Fire Rescue Department and/or the City of Greenacres?

YES X NO _____

If your answer to question 8 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s civil conspiracy claim, and you should skip questions 9 and 10, and go to question 11. If your answer to question 8 is YES, please answer question 9.

9. Was some overt act done in pursuance of the conspiracy?

YES X NO _____

If your answer to question 9 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s civil conspiracy claim, and you should skip question 10, and go to question 11. If your answer to question 9 is YES, please answer question 10.

10. Was there damage to Professional Medical Education, Inc. as a result of the acts done under the conspiracy?

YES X NO _____

If your answer to question 10 is NO, your verdict is for the Palm Beach County Health Care District on Professional Medical Education, Inc.'s civil conspiracy claim. If your answer to question 10 is YES, your verdict is for Professional Medical Education, Inc. on its civil conspiracy claim. Please go to question 11.

Damages Issues

11. If your verdict is for the Palm Beach County Health Care District on all time of Professional Medical Education, Inc.'s claims of defamation, tortious interference, and civil conspiracy, you will not consider the matter of damages, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your verdict is

for Professional Medical Education, Inc. on any of its three claims, please answer questions 11a and 11b.

11a.	What is the amount of any damages sustained by Professional Medical Education, Inc. for any earnings lost in the past?	$ 692,400.00
11b.	What is the present money value of any damages to be sustained by Professional Medical Education, Inc. in the future for lost earning ability?	$ 0

SO SAY WE ALL, this 3rd day of July, 2007.

/s/ Tanique Lee
Foreperson

Supreme Court, U.S.
FILED
APR 27 2010
OFFICE OF THE CLERK

No. 10-14

IN THE

Supreme Court of the United States

PROFESSIONAL MEDICAL EDUCATION, INC.,

Petitioner,

v.

PALM BEACH COUNTY HEALTH CARE DISTRICT and JEFF DAVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the petitioner's due process and equal protection claims have been preserved in the courts below.

II. Whether, contrary to the petitioner's representation in the Petition for Writ of Certiorari, a Florida state court has "insulate[d] a government tortfeasor from liability by application of a judicial doctrine (sovereign immunity), despite legislative action that has clearly waived sovereign immunity for negligence and intentional tort claims."

III. Whether the Petition for Writ of Certiorari and its Appendix set forth an arguable claim that a Florida state court has violated the due process and equal protection rights of the petitioner, and thus whether they set forth a basis for federal jurisdiction.

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STATEMENT OF THE CASE

The Statement of the Case in the Petition for Writ of Certiorari contains many erroneous statements. Their falsity is apparent on the face of the documents in the Appendix. This Statement of the Case will show that the petitioner's basic premises are without factual merit and the "Questions Presented" by the petitioner are not valid questions as a result.

The petitioner, Professional Medical Education, Inc. ("PME"), sued the respondents, the Palm Beach County Health Care District (the "District") and its Trauma Agency Director, Dr. Jeff Davis, under state law for defamation; tortious interference with PME's business relations; and conspiracy to commit those two torts. App. 1-2.

At the conclusion of the trial, the trial court found no jury issue as to whether Davis acted at all times within the scope of his employment, and granted a directed verdict for Davis. The trial court entered a judgment for Davis on all claims based on "absolute immunity under *McNayr v. Kelly*, 184 So. 2d 428, 433 (Fla. 1966)."[1] App. 5.

---

1. Throughout the trial and appellate proceedings the parties argued about whether the absolute privilege would preclude a judgment against Davis on the tortious interference count or solely on the defamation count. The Fourth District Court of Appeal's decision mooted this argument by holding, as the defendants had always argued, that the tortious interference count could not survive for other reasons. App. 5-10.

The trial court rejected the District's argument that if Davis was protected by the *McNayr* immunity, it necessarily followed that no judgment could be rendered against the District, which was sued only vicariously. App. 10, 20. The jury rendered a verdict against the District, App. 26-31, and the trial court rendered a judgment based on the jury's verdict. App. 12-13.

The District appealed the judgment to the District Court of Appeal of Florida ("DCA"), Fourth District, which reversed the judgment and remanded for the entry of a judgment in favor of the District. App. 1-11; *Palm Beach County Health Care Dist. v. Prof. Med. Educ., Inc.*, 13 So. 3d 1090 (Fla. 4th DCA 2009), *rev. denied*, 34 So. 3d 2 (Fla. March 30, 2010). The Fourth DCA held (1) the evidence could not support a judgment for tortious interference, for reasons related solely to state tort law, App. 5-10; (2) the trial court erred in denying the District the benefit of the absolute immunity from the defamation claim under *McNayr*, given that the allegedly defamatory statements were within the absolute privilege or immunity from defamation claims, App. 10-11; and, since neither of the tort claims could survive, (3) there was no underlying tort to support the conspiracy count and no other basis for an award of damages. App. 1-2, 11.

In this Court, the petitioner wrongly argues that the reversal of the judgment was based entirely on "sovereign immunity." In this argument, the petitioner actually attacks only one of the Fourth DCA's holdings: That if the absolute privilege from defamation claims applies to the respondent Davis, it necessarily follows that the District, sued vicariously as his employer, could

not be held liable. This ruling does not implicate sovereign immunity at all. It is based on the state law *McNayr* immunity, coupled with state law principles of vicarious liability.

The petitioner cross-appealed the separate final judgment in favor of Davis to the Fourth DCA, which affirmed the judgment in favor of Davis without comment. The petitioner does not seek review in this Court of the final judgment in favor of Davis; it is not even in the Appendix. Thus, the petitioner does not dispute the holding that the absolute immunity applied to Davis, but only the holding that it precluded a judgment against the District.

Neither does the petitioner seek certiorari based on the Fourth DCA's holding, App. 4-10, that the petitioner failed, as a matter of state law, to prove its claim for tortious interference with its business relationships; nor the Fourth DCA's holding, App. 1-2, 11, that the "conspiracy" count failed because the other two counts failed. It is therefore absurd for the petitioner to seek, as it does, Petition at 32-33, for this Court to reinstate the jury's verdict. A decision in favor of the petitioner on the federal arguments (which do not in fact raise federal claims) would mean the case would have to be remanded for reconsideration of how the other issues would be resolved in light of this Court's holding on the federal arguments. Moreover, the respondents made a number of other arguments below as to why the jury's verdict could not stand, and the Fourth DCA did not need to reach all of them. A decision of this Court that the "absolute privilege" was wrongly applied would mean the Fourth DCA might have to reach the other arguments.

The petitioner asserts "a panel of the Fourth District held that ***all*** of [p]etitioner's claims were barred by the doctrine of 'absolute immunity,' " Petition at 5 (emphasis in original), and that both the tortious interference and defamation claims were "barred by 'absolute immunity,' " Petition at 21, n.14. That is not so. In six pages of analysis devoted solely to the insufficiency of the evidence as to the tortious interference claim, App. 4-10, Chief Judge Gross, writing for a unanimous three-judge panel, made perfectly clear that the court's decision on that count had nothing to do with the absolute privilege.

Along the same lines, the petitioner asserts that the Fourth DCA stated that the tortious interference count was "barred by the doctrine of absolute immunity, based on another Fourth District case expanding this doctrine to tortious interference claims. *See City of Stuart v. Monds*, 10 So. 3d 1134, *rev. denied*, 23 So. 3d 712 (Fla. 2009)." Petition at 10-11 n.6. In fact, however, the Fourth DCA's decision carefully avoided relying on or endorsing *Monds*, saying in a footnote: "We note that another panel of this court recently applied the doctrine of absolute immunity to bar an action for tortious interference with an advantageous business relationship against a City and its employees [citing *Monds*] . . . This would be a separate ground supporting a judgment for the District on the tortious interference count." App. 10-11 n.2.

REASONS FOR DENYING THE PETITION

The petition should be denied because it fails to set forth any indication that any of the putative federal claims were preserved in the courts below. In fact, they had never been made until the Petition for Writ of Certiorari was filed.

On the merits, it would be an understatement to say the Petition for Writ of Certiorari should be denied because there are no "compelling reasons" for it to be granted. In fact, the Appendix fails to support the existence of a federal claim or any fairly debatable jurisdictional basis for certiorari to be granted.

The Appendix shows that the basic premise of the petition is untrue. The Fourth DCA did not "refuse to follow its own legislative waiver of sovereign immunity to defeat the claims of a party which prevailed at trial." Petition at 8. Neither did the court, "by judicial fiat, abrogate statutory law that waives sovereign immunity for claims against the State and its subdivisions." *Id.*

In the table of "Questions Presented," the petition asks: "Can a State of Florida insulate a government tortfeasor from liability by application of a judicial doctrine (sovereign immunity), despite legislative action that has clearly waived sovereign immunity for negligence and intentional tort claims?" The Appendix shows that the Fourth DCA did not apply sovereign immunity, nor offend Florida's statutory waiver of sovereign immunity.

I. THE PETITIONER'S ARGUMENTS WERE NOT PRESERVED.

The petition should be denied because it fails to comply with this Court's Rule 14.1.(g)(i). It fails to state:

> when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

In fact, the due process and equal protection arguments made in the petition were not raised in any court below, or ruled upon.

A. THE PETITIONER'S ARGUMENTS WERE NOT MADE IN THE SUPREME COURT OF FLORIDA.

Petitioner unsuccessfully sought discretionary review in the Supreme Court of Florida of the Fourth DCA's decision. Petitioner's jurisdictional brief in the Supreme Court of Florida made no reference to the Fifth or Fourteenth Amendments to the United States Constitution or to the substance of the due process and equal protection claims made here.

Under the Florida constitution, the Supreme Court of Florida's discretionary jurisdiction to review a DCA decision is limited. One category of discretionary review is from a DCA decision that "expressly construes a provision of the state or federal constitution." *See* Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii). Petitioner did not seek review on this basis.

Instead, the petitioner sought review in the Supreme Court of Florida under the category of discretionary review applicable to a DCA decision that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." *See* Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). All of the petitioner's arguments flowed from one premise: Where the Fourth DCA's decision found that, under the evidence, the respondents were entitled to a judgment as a matter of law, the petitioner argued that the questions were resolved by the jury and the trial court's final judgment should have been affirmed based on the jury's verdict.

B. THE PETITIONER'S ARGUMENTS WERE NOT MADE IN THE FOURTH DCA OR THE TRIAL COURT.

Neither were the petitioner's due process and equal protection claims preserved in the intermediate appellate court, which had mandatory, plenary jurisdiction to review the final judgment of the trial court. *See* Art. 5, § 4(b)(1); Fla. R. App. P. 9.030(b)(1)(A). The petitioner did not cite a single state or federal constitutional provision or decision of this Court in the

Fourth DCA. The petitioner made none of the federal claims now set forth in the Petition for Writ of Certiorari to this Court. Of course, these claims were not ruled upon. *See Palm Beach County Health Care Dist.*, App. 1-11. Finally, if the record is ordered, it will show that the petitioner failed to preserve in the trial court the arguments now made here.

II. ON THE FACE OF THE APPENDIX IT IS PLAIN THAT THE PETITIONER'S ARGUMENTS HAVE NO MERIT.

The petitioner's arguments flow from the premise that the Fourth DCA applied sovereign immunity in its decision to vacate the trial court's judgment against the District. It is apparent on the face of the Fourth DCA's opinion that this premise is false.

A. THE ABSOLUTE PRIVILEGE OF *McNAYR* IS NOT SOVEREIGN IMMUNITY.

In *Barr v. Matteo*, 360 U.S. 564 (1959), this Court held that the same "absolute privilege" from defamation actions extended to officers of the judicial and legislative branches should similarly extend to officers of the executive branch, *id.* at 569-573, even those "below cabinet rank." *Id.* at 572. The privilege is "absolute" inasmuch as it is not overcome by a showing of malice. *Id.* at 569. Under *Barr*, the absolute privilege would apply to an officer "of lower rank in the executive hierarchy" so long as the allegedly defamatory statement pertained to "matters committed by law to his control or supervision." *Id.* at 573 (internal quotation marks omitted).

Following suit seven years later, the Supreme Court of Florida adopted the same principle as a matter of Florida law in *McNayr*. *McNayr* borrowed from *Barr* in its analysis, and, like *Barr*, quoted from Judge Learned Hand's decision in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), to explain its rationale. *McNayr*, 184 So. 2d at 431 n.12; *Barr*, 360 U.S. at 571-72. *Barr* and *McNayr* were not based on sovereign immunity. Moreover, Florida's decision to follow *Barr* with respect to officers of the State of Florida was not compelled by any federal rule. The reasoning of *Barr* was adopted as a matter of the Florida common law of torts.

Confusing the absolute privilege with sovereign immunity, the petition calls the absolute privilege a "dubiously resurrected judicial immunity," Petition at 21, that is "idiosyncratic," at 8, and of "questionable pedigree," at 9. To the contrary, *McNayr* is the progeny of Judge Hand's opinion in *Gregoire* and this Court's holding in *Barr*.

In the particular holding now under attack in this Court, the Fourth DCA applied the well-established Florida absolute privilege as it has been applied and refined in cases since *McNayr*. Again and again, on motions to dismiss, for summary judgment, for involuntary dismissal at the close of the plaintiff's case, and in post-trial motions, the respondents argued that they were protected from liability for defamation — and indeed from having to defend the defamation claim — by the absolute privilege of *McNayr*. The privilege was never confused with "sovereign immunity" in any argument below, or by any lower court.

The trial court applied the absolute privilege to protect Davis from liability for defamation, but the trial court held that the absolute privilege did not protect the District. On this point the Fourth DCA reversed, and only on this aspect of the Fourth DCA's decision does the petitioner seek certiorari in this Court. The petitioner's argument that the very notion of state sovereign immunity is inherently contrary to the Due Process and Equal Protection Clauses — a truly astounding proposition — need not be addressed, for the ruling at issue was not grounded in sovereign immunity.

On its face, the Fourth DCA's decision was grounded in the law of vicarious liability:

> Because the liability of the District on the defamation count is predicated on its status as Davis's employer, the absolute immunity of Davis 'necessarily requires the exoneration' of the District. *Saxon v. Knowles*, 185 So. 2d 194, 196 (Fla. 4th DCA 1996); *see Bauer v. City of Gulfport*, 195 So. 2d 571, 573 (Fla. 2d DCA 1967); *Murphy v. City of Aventura*, No. 08-20603-CIV, slip op. at 5 n.3, 2008 WL 4540055 (S.D. Fla. Oct. 10, 2008); *Medina v. City of Hialeah*, No. 02-20957-CIV, 2003 WL 1562281 (S.D. Fla. Mar. 24, 2003).

App. 10; *Palm Beach County Health Care Dist.*, 13 So. 3d at 1095-96. All of the cited cases demonstrated that if a government employee's conduct was within the absolute privilege, the government agency could not be liable.

The petitioner cites to one of the leading Florida cases on the state's sovereign immunity law, *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979), and quotes from its first footnote: "We do not deal here with personal immunity of individual officers acting in their official capacity. This distinct principle of law is explored in cases such as *McNayr*." *Commercial Carrier*, 371 So. 2d at 1012 n.1, quoted in Petition at 27. In this footnote, the Supreme Court of Florida was distinguishing the entire subject of sovereign immunity from that of the absolute privilege. There is no merit to the petitioner's effort to suggest that this footnote supports its position.

In sum, the absolute privilege is not sovereign immunity.

B. THERE IS NO MERIT TO THE PETITIONER'S ARGUMENT THAT THE FOURTH DCA'S DECISION WAS SECRETLY BASED ON SOVEREIGN IMMUNITY OR VIOLATED THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY.

The petitioner argues that in the Fourth DCA's decision, sovereign immunity was merely masquerading as the absolute privilege, saying: "Chief Judge Gross has erroneously combined the doctrine of absolute privilege, not applicable to our facts, with the doctrine of sovereign immunity, resulting in a newly created shield which he called 'absolute immunity.' " Petition at 13. Later the petitioner says the Fourth DCA's decision relies on sovereign immunity and "calls it by a different name, 'absolute immunity.' . . . conflating the two distinct

legal doctrines that serve different purposes into a hybrid that serves neither." Petition at 10. These statements — supported by no authority — are the only argument the petitioner makes to support a conclusion that the Fourth DCA's decision on the absolute privilege was secretly based on sovereign immunity. Of course, there is no merit to this argument.

The Fourth DCA was perfectly clear in basing its decision on the absolute privilege of *McNayr*. App. 10-11, *Palm Beach County Health Care Dist.*, 13 So. 3d at 1095-96 ("On the defamation count, the circuit court properly granted Davis's motion for directed verdict under *McNayr*. . . . Davis was acting within the orbit of his duties and responsibilities when he wrote the February 23, 2000 letter."). The petitioner bases its entire contention on Judge Gross's use of the words "absolute immunity" interchangeably with the words "absolute privilege," as if the petitioner has unearthed a meaningful Freudian slip.

The petitioner is apparently unaware that Florida courts routinely interchange the terms "absolute privilege" and "absolute immunity" in reference to the immunity afforded to executive branch officials in defamation cases. *See, e.g., City of Miami v. Wardlow*, 403 So. 2d 414, 415 (Fla. 1981) ("It has long been clear that a high-ranking officer of the executive branch of the national government, in explaining to the public the reasons for a decision or policy, enjoys *absolute immunity* from suit for libel. *Barr*.") (emphasis added); *Crowder v. Barbati*, 987 So. 2d 166, 167 (Fla. 4th DCA 2008); *Goetz v. Noble*, 652 So. 2d 1203, 1204 (Fla. 4th DCA 1995); *Kribs v. City of Boynton Beach*, 372 So. 2d

195, 195 (Fla. 4th DCA 1979) ("In *McNayr*, . . . our [s]upreme [c]ourt gave *absolute immunity* to executive officials with respect to defamatory publications made in the performance of their official duties.") (emphasis added); *Densmore v. City of Boca Raton*, 368 So. 2d 945, 947 (Fla. 4th DCA 1979) ("In the landmark decision of *McNayr* . . . our [s]upreme [c]ourt extended the doctrine of *absolute immunity* from liability to executive officials with respect to defamatory publications made in connection with the performance of their official duties.") (emphasis added). In *Skoblow v. Ameri-Manage, Inc.*, 483 So. 2d 809 (Fla. 3d DCA 1983), the court said:

> In *McNayr* . . . the supreme court first recognized an executive official's *absolute immunity* from defamation actions based on statements made in connection with the performance of his duties and responsibilities. The court recognized that executive officials had the same *absolute immunity* afforded members of the judicial and legislative branches of government. 184 So.2d at 433.

Skoblow, 483 So. 2d at 810 (emphasis added). Even the seminal cases on the absolute privilege routinely called it an "immunity" from defamation suits:

> This Court early held that judges of courts of superior or general authority are *absolutely privileged* as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those

> acts are alleged to have been performed . . . and that a like *immunity* extends to other officers of government whose duties are related to the judicial process.

Barr, 360 U.S. at 569 (citations omitted, emphasis added). *See also Barr*, 360 U.S. at 574 (holding that the scope of the executive branch officer's duties "must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with *immunity* from civil defamation suits") (emphasis added); *McNayr*, 184 So. 2d at 429 ("The question here . . . is whether the same *immunity* [as that extended to the judicial and legislative branches] should be extended to the executive branch of government. We think it should.") (emphasis added); *McNayr*, 184 So. 2d at 431 ("The question . . . of *absolute immunity* to those engaged in the executive branches of government is one of somewhat modern origin.") (emphasis added).

In sum, there is no basis in fact for the petitioner to assert that the Fourth DCA's ruling on the absolute privilege issue was really a sovereign immunity decision in disguise.

CONCLUSION

In applying the *McNayr* immunity, the Fourth DCA did not violate due process by creating a new doctrine, resurrecting an ancient doctrine, or overriding Florida's statutory waiver of sovereign immunity. The *McNayr* immunity does not violate PME's equal protection rights because in suing Davis and the District for defamation, PME is not similarly situated to those whose defamation actions are brought against defendants who are not within the *McNayr* immunity.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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